

11-10189 TREVINO V. THALER

DECISION BELOW: 449 Fed.Appx. 415

LOWER COURT CASE NUMBER: 10-70004

QUESTION PRESENTED:

1. In federal habeas proceedings, undersigned counsel raised for the first time a claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), that trial counsel were ineffective for failing to investigate the extraordinary mitigating evidence in Mr. Trevino's life. The federal proceeding was stayed to allow exhaustion, but the Texas Court of Criminal Appeals dismissed Mr. Trevino's *Wiggins* claim under state abuse of the writ rules. Thereafter, the federal district court dismissed the claim as procedurally barred, finding no cause for the default. On appeal, Mr. Trevino argued that the Court of Appeals should stay further proceedings until this Court resolved the question then-pending in several cases whether ineffective assistance of state habeas counsel in failing to raise a meritorious claim of ineffective assistance of trial counsel established cause for the default in state habeas proceedings. The Court of Appeals refused to stay Mr. Trevino's appeal for this purpose. Four months later, this Court decided in *Martinez v. Ryan*, 132 S.Ct. 1309 (March 20, 2012), that ineffective assistance of state habeas counsel in the very circumstance presented by Mr. Trevino's case could establish cause for the default of a claim of ineffective assistance of trial counsel. These circumstances present the following question:

Whether the Court should grant certiorari, vacate the Court of Appeals opinion, and remand to the Court of Appeals for consideration of Mr. Trevino's argument under *Martinez v. Ryan*?

2. Mr. Trevino raised a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that the trial prosecutor suppressed a statement to the police by a codefendant to the effect that Trevino did not commit the capital murder. To rule against this claim, the panel majority in the Court of Appeals-without notice to Mr. Trevino or his counsel-conducted its own investigation of the separate trial court record of this codefendant, found a subsequent statement by him contradicting his exculpatory statement, took judicial notice of the statement and used it as the basis for affirming the district court's denial of Mr. Trevino's *Brady* claim. The panel majority acknowledged the lack of notice to Trevino, but said that he could be heard by petition for rehearing. Trevino presented arguments on rehearing and on rehearing en banc, but both were summarily denied. These circumstances present the following question:

Whether the Court of Appeals' denial of notice and an opportunity to be heard on a matter that is determinative of a meritorious *Brady* issue requires the Court's exercise of its supervisory powers to assure that Mr. Trevino is afforded a fair opportunity to be heard on appeal?

GRANTED LIMITED TO QUESTION 1 PRESENTED BY THE PETITION.
CERT. GRANTED 10/29/2012